What Powers at What Level?

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How to allocate the powers to collect information, surveil and restrict investment between the EU and the Member States? The question which competence the EU can base a legislative measure on is not only of importance for the legal validity of the measure, it also has far reaching ramifications for the underlying political relationship between the EU and its Member States.

Competence allocation according to the draft regulation

The Commission explicitly bases the regulation on art. 207 (2) TFEU as part of the common commercial policy falling within the exclusive competence of the EU. From this it follows that Member States are prohibited to enact national legislation as long as they are not authorized by the EU to do so (art. 2 (1) TFEU). Thus, it would fit to see the regulation as an authorization of the MS to keep their national screening mechanisms in place. The language of the explanatory memorandum partly reflects this, when it describes the regulation as "an enabling framework for Member States" to provide legal certainty.

Unfortunately, things are not that clear. The explanatory memorandum also states the regulation merely "confirms" that FDI may be screened by the Member States. However, if FDI screening falls within the exclusive competence of the EU, which Member State competence is there to be "confirmed"? Rather, Member States would have to be explicitly *empowered* (or "enabled").

Restriction of the freedom of capital movement?

Another possible legal basis for the proposed regulation could be seen in art. 64 (3) TFEU. The provision allows the Council, acting in accordance with a special legislative procedure, to "adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries." Screening mechanisms can constitute such measures since they usually create certain administrative obstacles for the foreign investor to move capital into the European Union. At the same time, Member States could base their existing screening mechanisms on the exemption clause of art. 65 (1) b TFEU which grants Member States the right "to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security." The EU regulation and the national legislations would then go hand in hand – without a need for an authorization of the Member States by the EU. This result would have two important consequences: Firstly, the matter would not fall within the exclusive competence of the EU which means that current national screening mechanisms

would not be in violation of EU law. Secondly, the legislative procedure is different. Whereas art. 207 (2) TFEU refers to the ordinary legislative procedure, art. 64 (3) TFEU prescribes a unanimous decision by the Council. Member State control over the new FDI screening framework would be significantly higher.

Art. 207 (2) TFEU or art. 64 (3) TFEU as *lex specialis*?

The majority of commentators sees art. 207 (2) TFEU as the correct legal basis for investment restricting legislative measures.[1] This position is partly based on the requirement of "uniform principles" in paragraph 1 of art. 207 TFEU which – according to this position – can only be achieved through exclusive competence of the EU. Yet, instead of finding a general preference of one legal basis over the other, it might be more convincing to look at each legislative measure on a case by case basis. A strong argument for art. 207 (2) TFEU with a view to the proposed regulation is that the regulation itself hardly constitutes "a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries" (art. 64 (3) TFEU) but rather a "framework" (art. 207 (2) TFEU) that provides for the coordination between different national screening mechanisms. An interesting scenario that needs to be further addressed would be an EU regulation which creates additional barriers such as a reciprocity requirement in the liberalisation of FDI. In this situation the language of art. 64 (3) TFEU might provide a strong *lex specialis* argument and also the special legislative procedure could suite the highly political nature of such a regulation more. With regards to the current proposal, however, art. 207 (2) TFEU appears to be the correct legal basis.

"Almost" exclusive competence

With this in mind, the question arises whether current Member States screening mechanisms are now – in the absence of an authorization – in violation of EU law. The basic answer to this question might not be surprising: More than one provision as well as the unwritten exemptions based on the case law of the CJEU grant Member States the right to take measures for the protection of national security or public order. Whether this can be achieved by relying on art. 65 (1) b TFEU "via" art. 207 (6) TFEU or art. 346 (1) b TFEU or unwritten exemptions is a question that has to be further addressed in detail. What could already be concluded now is that current Member States screening mechanisms do not – against the view of some commentators – constitute a violation of EU law. Rather, the draft regulation should be understood as ensuring that Member States screening mechanisms are based *only* on grounds of national security and not on other policy objectives (art. 3 (1) of the regulation). It is at this point the regulation proves that it aims at a liberal FDI framework: The text of the regulation obliges Member States not to take any FDI restricting measures which are not based on national security while at the same time the regulation itself does not go beyond security concerns – even if it could do so based on art. 207 (2) TFEU or art. 64 (3) TFEU.

1*Boysen*/*Oeter*, in: Schulze/Zuleeg/Kadelbach (eds.), Europarecht, 3. Aufl. 2014, § 32 Rn. 34 f.; *Beuttenmüller*, Das deutsche Außenwirtschaftsgesetz vor dem Hintergrund der neuen Unionskompetenz für ausländische Direktinvestitionen, 28 Ritsumeikan Law Review 2011, S. 281 (286); *Herrmann*, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW 2010, S. 207 (208 f.); *Nowak*, Europarecht nach Lissabon, 2011, S. 264
